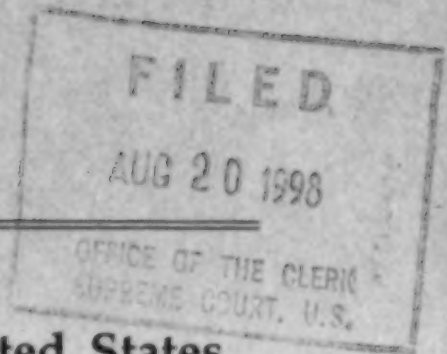


No. 97-1536



In The
Supreme Court of the United States
October Term, 1997

STATE OF ARIZONA ex rel.
Arizona Department of Revenue,
Petitioner,
v.

BLAZE CONSTRUCTION COMPANY, INC.,
Respondent.

On Writ Of Certiorari To The
Arizona Court Of Appeals, Division One

BRIEF FOR THE GILA RIVER INDIAN
COMMUNITY AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENT
BLAZE CONSTRUCTION COMPANY, INC.

RODNEY B. LEWIS
General Counsel
Counsel of Record
Amicus Curiae, Gila River Indian
Community
P.O. Box 97
Sacaton, Arizona 85247
(520) 562-6200

QUESTION PRESENTED

Is the imposition of a state transaction privilege tax on road construction activity located entirely on Indian reservations pre-empted by the Indian Commerce Clause when the road construction is financed and regulated by the federal government, through the Bureau of Indian Affairs, and the state provides no services and does not otherwise regulate activities related to such road construction.

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INTEREST OF THE *AMICUS CURIAE*¹

The Gila River Indian Community, a federally – recognized American Indian tribal government organized under a constitution adopted pursuant to the Indian Reorganization Act, 25 U.S.C. Section 476, (the “Community”) has a vital interest in the resolution of the present matter inasmuch as what is to be decided is whether a state’s taxation authority will be construed to be so expansive as to apply to the gross revenues of a party doing business on reservation lands pursuant to federal contract. The Community, and other American Indian tribal governments, will sustain a direct negative impact on its ability to exercise its own taxation power, a potentially dire impact on the Community’s economic resources, should this matter be decided in favor of Petitioner, the state of Arizona. Additionally, this matter presents critical policy concerns as it involves state attempts to tax proceeds derived from a contractual arrangement instrumental to the government-to-government relationship between the federal government, as Trustee, and American Indian tribes, as beneficiary, a relationship that does not include or involve the state of Arizona.

¹ The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

STATEMENT OF FACTS

The United States Department of the Interior, Bureau of Indian Affairs (the "BIA"), provides services to the Community through its Pima Agency in fulfillment of the federal government's trust responsibility to American Indians. Indeed, virtually all of the roads on the Reservation were constructed and are maintained by the BIA for the benefit of the Community and Community members in execution of the federal-Indian trust relationship.

Respondent, Blaze Construction Company ("Blaze") is a 100% Indian-owned contracting business, incorporated under the laws of the Blackfeet Nation with its principal place of business in Oregon. The United States, through the Bureau of Indian Affairs (the "BIA"), contracted with Blaze to construct a number of roadways on Indian reservations situated within Arizona. Through its Department of Revenue, Arizona sought to assess its transaction privilege tax upon gross receipts Blaze derived from its contracts with the BIA. Blaze protested the assessment.

The Arizona Tax Court granted summary judgment (unreported) in favor of Arizona, holding that Arizona may tax a contractor conducting business with the United States on Indian reservations situated within Arizona.

The Arizona Court of Appeals reversed the holding of the Arizona Tax Court, concluding that the congressional intent underlying the Buy Indian Act, 25 U.S.C. Section 47; the Indian Self-Determination and Education Assistance Act of 1990, 25 U.S.C. Section 450 *et seq.* and regulations promulgated thereunder pre-empted Arizona's taxation authority. 947 P.2d 836 (Ariz. App. 1997).

Arizona appealed the decision to the Arizona Supreme Court, which denied Arizona's petition for review (unreported). Arizona then submitted a petition for writ of certiorari to this Court.

SUMMARY OF ARGUMENT

Petitioner contends that it can rightfully tax an Indian contractor conducting business on an Indian reservation pursuant to contracts between the Indian contractor and the United States, simply because the business occurred within the state's exterior boundaries and it had enacted law unilaterally laying claim to tax revenues derived from on-reservation commerce. In a misbegotten attempt to satisfy the test enunciated by the courts in a number of decisions approving state taxation of reservation-based business activities, Arizona cites certain minimal services provided the Reservation even though the services noted are unrelated to the roads constructed pursuant to the Blaze contracts. *Amicus Curiae* contends that the Arizona Court of Appeals correctly decided this matter in holding that Arizona's taxes are pre-empted by federal law, including primarily the Indian Commerce Clause found within Article I, section 8 of the United States Constitution.

ARGUMENT

The Indian Commerce Clause is the result of a long history of Indian relations beginning with the first contact with the Indians and reflects the intent of the framers

of the United States Constitution that relations with Indians be exclusively reserved to the federal government. The Indian Commerce Clause remains the correct mechanism through which the outcome of this case and future like cases must be determined.

I. THE GENESIS OF THE INDIAN COMMERCE CLAUSE DEMONSTRATES THAT THE INTENT OF THE CLAUSE IS TO PROHIBIT THE STATES FROM INVOLVEMENT WITH INDIAN TRIBES IN COMMERCE AND SIMILAR ACTIVITIES. THE INTENT OF THE INDIAN COMMERCE CLAUSE PRE-EMPTS STATE TAXATION IN THE INSTANT MATTER.

Without ambiguity, the Indian Commerce Clause applies to the regulation of trade and intercourse between the federal government, Indian tribes and the tribes' non-Indian neighbors in the context of transactions occurring wholly within the tribes' reservations. At the very least, the Clause must be read to exempt from state burdens all substantial commerce that benefits the tribes and their members in endeavors that serve the vital interests of reservation communities.

Since the discovery of the lands that presently comprise the United States, the legal entitlements and status of the land's native occupants has continued to trouble this nation's constitutional order. Early federal Indian case law established that the lands in question were "discovered" and that "discovery gave title to the government by whose subjects, or by whose authority, it was made . . ." The rights of those "discovered" were reduced

to a "right of occupancy." *Johnson v. M'Intosh* 21 U.S. (8 Wheat) 543, at 573 and 577 (1823).

Relations in the form of trade between the Indians and settlers, critical to the survival of the colonists, inevitably began and began immediately. While the discovery doctrine devised a legal fiction under which the lands occupied by Indian nations were deemed to be acquisitions of the English crown, it accomplished little to allay the conflicts between the native and colonial populations.

One of the first documented cases evidencing the difficulties of trade relations between Indian tribes and colonists was *The Mohegan Indians v. Connecticut*. See Joseph Henry Smith, *Appeals to the Privy Council from the American Plantations*, 422-442 (1950) and Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn.L.Rev. 1055 (Summer 1995). In the 1630's, after Connecticut was settled with the assistance of the Unca Indians, the land was claimed to be the property of the English. The Mohegans disagreed and asserted claims to the property as an independent nation. The matter, eventually appealed to the Crown, was left unresolved for almost three quarters of a century. The unreported decision is important because in it is observed the assignment of Indian affairs to a central, non-localized authority, a principle that proved effective enough to be retained until it found its place in the United States Constitution as the Indian Commerce Clause.

The dilemma of how Indians should be treated remained unanswered even as the cause of colonial independence from the British government took shape. Under the British government, the central government was

responsible for dealing with the Indians, much to the dislike of the colonists. The advantages of centralized governmental power were not overlooked when the Declaration of Independence officially declared the new republic's independence from the British.

Despite the colonists' desire that Indian affairs be locally regulated, the Articles of Confederation, the governing document of the nascent republic, vested authority over relations with the Indians in the centralized government. Article IX of the Articles of Confederation specifically stated that the Congress of the United States shall have, "the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated." The Articles were presented for passage in 1777 and remained in effect until approximately 1781. See Allen Johnson, *Readings in American Constitutional History*, 80 (1912), Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn.L.Rev. 1055, 1106.

Notwithstanding this reservation of power, local colonial governments continued to assert regulatory control over the Indian tribes with whom they came into contact. Complaints concerning unfair and unethical trade practices persisted and Indian hostilities grew unabated. The need to establish peaceful relations resulted in several treaties whereby the centralized government attempted measures designed to ensure fair and honest dealings by the local governments. See Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13; Treaty with the Six

Nations, Oct. 22, 1784, 7 Stat. 15; Treaty of Hopewell with the Cherokees, Nov. 28, 1785.

The treaties, executed pursuant to Article IX of the Articles of Incorporation, indicate the constitutional foundation of United States relations with Indian nations, that the central, federal government was to exercise powers to regulate trade with the Indians and manage Indian affairs, to the exclusion of state authority.

Unfair trade practices were not the only issue that caused concern in the area of Indian affairs. Continued expansion of white settlers resulted in frequent encroachment of Indian lands. Again, the Indians grew hostile and the Continental Congress felt increasing need to officially outline the relations between the Indians and the white settlers. On September 22, 1783, the Continental Congress issued a proclamation that prohibited unauthorized settlement or purchase of Indian lands. The proclamation stated, "it is essential to the welfare and interest of the United States as well as necessary for the maintenance of harmony and friendship with the Indians . . . that all cause or quarrel or complaint between them and the United States, or any of them, should be removed and prevented [therefore all persons are prohibited] from making settlements on lands inhabited or claimed by Indians . . . without the express authority and directions from the United States and Congress assembled." *Journals of the Continental Congress*, 25: 602. Thus the Continental Congress accepted and asserted that the federal government was the sole authority to deal with Indian affairs and that states were themselves foreclosed from undertaking any relations with Indian nations without the express consent of Congress.

Congress reiterated this position a month later in a report of the Committee on Indian Affairs issued on October 15, 1783, which outlined a federal procedure for relations with Indians. Congress went further in passing the *Ordinance for the Regulation of Indian Affairs* on August 7, 1786, which established federal regulations for the granting of trade licenses and licenses to live within Indian territory.

Popular disappointment in the Articles of Confederation resulted in the publication of a series of documents penned to gain support for an organic document to replace the Articles of Confederation. *The Federalist Papers* discussed the goals and priorities of the government and advocated the opinion that it is important for the people to be united under a centralized, federal government. These publications specifically treated the subject of Indian affairs and concluded support for a scheme in which authority over Indian affairs would be vested in the federal government. John Jay, in *Federalist Paper Number 3*, wrote, for example, that "[n]ot a single Indian war has yet been occasioned by aggressions of the present federal government . . . but there are several instances of Indian hostilities having been provoked by the improper conduct of individual States, who either unable or unwilling to restrain or punish offences, have given occasion to the slaughter of many innocent inhabitants." The wisdom of such an arrangement found support as well in James Madison's *Federalist Paper, Number 42*, which specifically advocated that the federal government should have the authority, "to regulate commerce among the several States and the Indian tribes . . ." The need to foreclose the states from inserting themselves and their

interests into Indian affairs was also addressed in light of the historical record of unfair and greedy practices undertaken against Indian parties, an undeniable source of hostilities between the communities.²

The subject of Indian affairs was placed in discussion before the Constitutional Convention on July 11, 1787. Underlying the decision that Indians "not paying taxes" were not to be considered for the purpose of determining representation³ was recognition that Indians were separate and distinct entities, not a part of any state. (See Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn.L.Rev. 1149 (Summer 1995)). Discussion about Indian affairs did not arise again until August, 1787, when James Madison suggested that the power to "regulate affairs with the Indians . . ." was properly one belonging to the realm of federal power and proposed the addition of language to the proposed Constitution. On September 4, 1787, David Brearley suggested that Madison's language be modified, recommending that authority over commerce with Indian tribes be expressly inserted into the proposed Commerce Clause. Thus, when

² See also *The Federalist Papers, Number 24*, drafted by Alexander Hamilton which advocated that the federal government should have the power to provide for the common defense of the nation and advocated for the establishment of posts to command territory and specifically recognized that some of the posts would border Indian country and "be keys to the trade with the Indian nations." Alexander Hamilton, James Madison, and John Jay, *The Federalist*, (1961) at 208.

³ James Madison, *Notes of Debates in the Federal Convention of 1787 Reported by James Madison*, 119 (1787). This formula for determining representation remained in effect until approximately 1868.

the Constitution was approved on September 12, 1787, Article I, Section 8 of the United States Constitution read, "Congress shall have the Power . . . to regulate Commerce with . . . the Indian tribes."

Statutory enactments and case law comporting with the clear Constitutional scheme foreclosing state activities from relations with Indian tribes followed with secure acceptance until well into the twentieth century. Article III of the *Northwest Ordinance* states, "[t]he utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty, they never shall be invaded or disturbed unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them." *Northwest Ordinance*, July 13, 1787. The *Trade and Intercourse Act*, U.S. Statutes at Large 1: 137-38, prohibited trade or other relations with Indian tribes without a license issued by an appropriate party as designated by the President of the United States.

Early cases before the federal courts further demonstrate that relations with Indian tribes were intended to be exclusive with only the federal government. In 1823, *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543 (1823), for example, Chief Justice Marshall, writing for the court, recognized the federal government, as the absolute title holder with respect to Indian lands, with the Indian inhabitants of the controverted lands retaining a mere right of possession. "An absolute title," Marshall stated, "cannot exist, at the same time, in different persons, or in

different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it." *Id.* at 588. (Emphasis added). Marshall concludes his analysis ruling that "[t]he claim of the government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right." *Id.* at 603.

In the following year, Chief Justice Marshall authored the decision of *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824), advanced the doctrine that federal law is supreme in instances in which federal and state law is in conflict. Further, the Court found that the term "regulate" implies exclusive power over the activity regulated to the exclusion of other governments seeking to assert their own regulation. Because the Constitution vested the power to regulate commerce with Indian affairs in the federal government, states are prevented from exercising the same power.

In subsequent decisions, Chief Justice Marshall outlined the relationship between the United States and Indian tribes. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet) 1 (1831), for example, the Chief Justice gave further articulation to the legal status of Indian tribes as "domestic dependent Nation[s]." Further, the Court opined, "in any attempt to intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States . . . they admit the United States shall have the *sole and exclusive* right of regulating the trade with them, and managing *all* their affairs as they think proper." *Id.* at 17. (Emphasis added.) As domestic dependent nations, the Court analogized the

relationship of the Indian tribes to the federal government as that "of a ward to a guardian," *id.* at 17, and, as such, any attempt to acquire Indian land "would be considered by all as an invasion of [the] territory, and an act of hostility" against the guardian, the United States. *Id.* at 17-18.

Finally in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Court utilized the principle outlined in *Gibbons v. Ogden* that, in the event of conflict, State law is superceded by federal law. *Worcester* involved the state of Georgia's attempt to exert its authority over activities of an individual residing within the Cherokee Nation with the permission of the Cherokee Nation and the United States, but in violation of a Georgia statute. The opinion of the Court specifically recognized that, "[t]he whole intercourse between the United States and [the Cherokee] nation, is, by our Constitution and laws, vested in the government of the United States." *Worcester* at 561.

The series of cases discussed above demonstrate the exclusive authority of the federal government in all relations with Indian tribes which is a fundamental provision of this nation's constitutional legacy. This arrangement embodies the framer's intent to protect the rights of Indian people from intrusion by and unfair practices of the states.

II. THE DOCTRINE OF CONSTITUTIONAL PRE-EMPTION SUPPORTS THE EXCLUSION OF ARIZONA'S TAXATION AUTHORITY VIS-À-VIS RESPONDENT.

Of its own force, the Indian Commerce Clause pre-empts state regulation and taxation of on-reservation trade that is intended to benefit tribal members. When understood in its historical context, the Indian Commerce Clause authorizes complete and absolute federal regulation of trading on Indian reservations to the exclusion of state authority. Congress's fealty to the principle that the federal government's authority over Indian relations is absolute, exclusive, is evident in the provisions of the Indian Trade and Intercourse Acts, which made clear that federal regulation would be restrictive, if not prohibitive, and exclusive in its very nature. *See, e.g.*, Act of March 1, 1793, ch. 19, Section 67, 1 Stat. 330; Act of June 30, 1834, ch. 161, Sections 3, 7, 20, 4 Stat. 729, 730, 732; 25 U.S.C. 263. But it was not only the power granted to Congress that was more pervasive and directed to a distinct goal; the Indian Commerce Clause had a significant negative impact on state action. The position of the *Amicus Curiae* is that the Clause reserved to the national government exclusive authority, absent any delegation thereof, for the regulation of intercourse with Indian tribes. Madison's vision that the Indian Commerce Clause, in entrusting the national government with exclusive authority over intercourse with Indian tribes, would resolve the tensions prevalent among the states with respect to Indian commerce, prevailed in the early years of the Republic.

It is not surprising that this Court, during the century after the Constitution was implemented, upheld Congress's exclusive and absolute power to regulate

commerce with the Indian tribes in *United States v. Forty-Three Gallons of Whiskey*, 98 U.S. 188, 194 (1876). The Court reached this conclusion following its review of the history of the Indian Commerce Clause and in which it was decided that the provisions of the Indian Commerce Clause intentionally altered the regulatory scheme of the Articles of Confederation, which did not include Indian commerce as a dominion of federal authority. This Court may have stepped back from this principle in recent times, but the Clause is available for active service whenever called.

Amicus Curiae suggests that the appropriate rule is that, absent congressional authority expressly delegated, the Indian Commerce Clause does not tolerate a state tax directly upon on essential commerce intended to directly benefit Indians. The direct and beneficial impact of the transaction in the instant matter, for Indians, remains within exclusive federal control and therefore beyond the State's power to tax.

It is beyond doubt that when the states joined the republic established by the Constitution of 1787, they relinquished their claims to participate in Indian affairs and accepted the national government's exclusive authority in this area. The Indian Commerce Clause speaks directly to the regulation of trade and intercourse between Indian tribes, within their territories and their non-Indian neighbors. Properly read, the Indian Commerce Clause prevents state interference in all transactions occurring on Indian reservations that are intended to specifically benefit Indians.

The matter at hand involves an Indian contractor constructing roads for the United States, Department of Interior, Bureau of Indian Affairs. Consistent with the "guardian-ward" relationship first pronounced in *Cherokee Nation v. Georgia*, the Bureau of Indian Affairs, an instrumentality of the United States, has the authority to enter into such agreements for the benefit of the "domestic dependent" Indians. The recipient of the benefit of the roadways is primarily the Indian tribe and its members, not the state of Arizona. Ownership of the roads, including their maintenance, remains in the United States and in no manner involves Arizona interests. Arizona does not participate in the road construction, maintenance or even patrol of these roadways. In fact, in all aspects the role of the State of Arizona on Indian reservation roads is de minimus. Further, the revenues generated by Arizona's tax would not be used to support or provide services for these roads. It therefore defies logic that Arizona's taxes would have any jurisdictional basis in respect to proceeds derived by the Respondent under his contracts with the federal government.

Throughout the changes in the form of government, British rule, the Articles of Confederation and the United States Constitution, one doctrine has remained constant; the central government must have sole and exclusive authority over Indian affairs to protect the Indians from state greed. Based on the lengthy history of the Indian Commerce Clause it is clear that the intent of the Clause was to prohibit state interference in activities in Indian country. The history of the Indian Commerce Clause represents regulation in matters involving Indian nations that is so expansive that there is no room for Arizona's

taxation in this case. The Buy Indian Act, 25 U.S.C. § 47, BIA regulations and the Indian Self-Determination and Education Assistance Act of 1990, 25 U.S.C. § 450 *et seq.*

Further, in accordance with the doctrine that federal law is supreme to state law and in the event of conflict, federal law applies as established in *Gibbons v. Ogden* in 1824, the imposition of Arizona's asserted ability to tax in these circumstances must yield to the original intent of the framers of the Constitution in drafting the Indian Commerce Clause that matters involving Indians is the exclusive authority of the federal government.

III. ARIZONA'S IMPOSITION OF TAXES IN THIS CASE INTERFERES WITH TRIBAL SOVEREIGNTY.

As previously stated, recent trends in case law reflect that imposition of state law in certain circumstances is allowable, conditioned upon a balancing of interests and provided that there is no interference with tribal self-regulation. See *Williams v. Lee*, 358 U.S. 217 (1959); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 447 U.S. 135 (1980); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980); *United States v. New Mexico*, 455 U.S. 720 (1982). Arizona's imposition of the tax in the current case represents a significant interference with tribal self-regulation and sovereignty. The facts of this case show that Arizona has no involvement with the issues at hand. See *Transcript of Hearing Before Department of Revenue Hearing*

Officer, Joint Appendix. Arizona cites the provision of minimal services to a single public school on the reservation and almost non-existent police services through the Arizona Department of Public Safety, yet fails to demonstrate how the provision of the services relate to Respondent's activities or how its interests in the taxation of the contractor outweigh the interest of the tribe and United States in tax exemption. As stated previously, the roads will remain the property of the United States and maintenance of such roadways will remain the responsibility of the United States. Police protection will be primarily the duty of the tribal government. While some BIA roads connect to state routes, they primarily serve the Community's rural setting. While the roads are open to the general public, there is little or no provision of services by Arizona that could remotely justify the imposition of taxes in this instance.

The United States and all tribal governments, on the other hand, carry a significant interest in the general welfare of their memberships and the obligation to provide transportation infrastructure through which the needs of their communities can be served. If Arizona is allowed to tax in this instance, despite the fact that the tax will be passed along to the United States, it is not the United States, but American Indian tribal governments that will feel the substantial impact of a decision by this Court in Arizona's favor. Tribes and their members will in actuality carry the burden and suffer the consequences of a tax approved in this matter and the sovereign powers of the tribes will therefore be significantly interfered with. Arizona's efforts to intrude into tribal sovereignty

through the assertion of its taxes upon Blaze must not receive the approval of this Court.

CONCLUSION

The history of relations with the Indians demonstrates that the Indian Commerce Clause must be afforded due deference. This means that the national government has exclusive authority over intercourse with transactions that benefit Indian tribes and their members that occur on Indian reservations. The State of Arizona may not impose its tax on the Respondent. The judgment of the lower court must be affirmed.

Respectfully submitted,

RODNEY B. LEWIS, General Counsel
Amicus Curiae, Gila River Indian
Community